

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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Federal Communications Commission  
Office of Secretary

In re Applications of )  
RAINBOW BROADCASTING COMPANY ) GC Docket No. 95-172  
For an Extension of Time to Construct ) File No. BMPCT-910625KP  
and ) File No. BMPCT-910125KE  
For an Assignment of its Construction Permit ) File No. BTCCT-911129KT  
for Station WRBW(TV), Orlando, Florida )

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To: Honorable Joseph Chachkin  
Administrative Law Judge

**SEPARATE TRIAL STAFF'S CONSOLIDATED REPLY TO  
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. On September 26, 1996, Rainbow Broadcasting Company ("RBC"), Rainbow Broadcasting, Ltd. ("RBL"), Press Broadcasting Company ("Press"), and the Separate Trial Staff filed their respective Proposed Findings of Fact and Conclusions of Law in the above captioned proceeding. The Separate Trial Staff submits the following consolidated reply. The Staff's failure to respond to a particular finding of fact or conclusion of law should not be considered a concession to its accuracy or completeness. The Staff submits that its own proposed findings of fact are an accurate and complete presentation of the relevant record evidence and that its conclusions of law properly apply Commission precedent in light of the record.

2. Despite the lengthy record in this proceeding (*i.e.*, hundreds of pages of

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exhibits and over a thousand pages of hearing testimony), the critical and dispositive facts are not complex and may be summarized as follows: RBC did not undertake construction at all during the relevant time period in this case, *i.e.*, August 30, 1990 (the date the Supreme Court denied rehearing in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 1050) through August 5, 1991 (the expiration date of RBC's fifth extension of time to construct). RBC principal Joseph Rey testified that RBC's failure to construct during most of this period resulted from the pendency of the Miami Tower Litigation, which was a lawsuit initiated by RBC to keep its competitor, Press, off of the top slot of the Bithlo tower. Notwithstanding this testimony, the evidence establishes that RBC's failure to construct was the result of one thing and one thing only: RBC's own voluntary business decision not to build. This decision was attributable to RBC's burning desire to avoid what Mr. Rey repeatedly characterized as the unfavorable economic environment in the Orlando market in which RBC's station, had it been built at the time, would have been the sixth station in the market and, in Rey's opinion, "worthless." *See, e.g.*, Tr. 780-81, 790, 872, 888, 916, 989; see also Press Ex. 9, pp. 9, 12-14; Staff Findings, ¶¶ 156-158, 176. Virtually everything else in the case -- *i.e.*, the financial misrepresentation issue, the tower litigation misrepresentation issue, and, of course, the extension/waiver issue -- arises from these dispositive facts and compels denial of the extension applications. *See generally Kin Shaw Wong*, FCC 96-365, released September 25, 1996 ("*Wong*") (application for extension of time to construct new AM radio station denied).

### **Tower Litigation Misrepresentation Issue**

3. RBC represented in its fifth and sixth extension applications that "actual construction has been delayed by a dispute with the tower owner which is the subject of a

legal action." But the record shows that this statement was not true. *See Staff Findings*, ¶¶ 156-163.

4. The Miami Tower Litigation was initiated by RBC and did not prevent RBC from going forward with construction of its station, and RBC knew it. The evidence shows that RBC decided to delay construction until the economy improved. This decision was based on Mr. Rey's pessimism about the economy and the low value of RBC's construction permit if RBC was the sixth station in the market. Therefore, it is concluded that RBC intentionally misrepresented the nature of the tower litigation in its extension applications. At the very least, RBC was lacking in candor about the litigation. *See Staff Findings*, ¶¶ 156-163.

5. RBC asserts (RBC Findings at ¶¶ 65-67) that Mr. Rey believed the permittee could not go forward with construction during the pendency of the motion for a preliminary injunction in the Miami Tower Litigation because of something Judge Marcus said at a prehearing conference in the case. Rey testified that he believed RBC was precluded from constructing between late November 1990 and June 1991. Mr. Rey also testified that RBC could not build without the landlord and the landlord wasn't talking to RBC at the time. However, the record shows that Mr. Rey's testimony was not credible and must be rejected. *See Staff Findings* at ¶ 158. RBC does not deny that if this particular testimony is not credited, the tower litigation misrepresentation issue must be resolved against it.

#### **Financial Misrepresentation Issue**

6. Mr. Rey's pessimism about the viability of RBC as the sixth station in the market also led to the financial misrepresentations in the fifth extension application. The

record unquestionably established that on January 11, 1991, in the Miami Tower Litigation, Mr. Rey testified that Mr. Conant's financial commitment was "on hold" and that he would not finance RBC (and RBC would not be able to secure any other financing) if Press became the fifth market station, pushing RBC into the sixth position. See Staff Findings at ¶¶ 45-49, 54. At the time that RBC filed its fifth extension application two weeks later, Mr. Rey continued to hold those views. See Staff Findings at ¶ 56. Yet, RBC did not disclose these facts to the Commission in its fifth extension application. Instead, RBC *affirmatively* told the Commission that all of its past representations remained true and correct (Jt. Ex. 2, p. 1), and further represented that it was "ready, willing and able" to commence construction upon the conclusion of the Tower Litigation without further qualification (Jt. Ex. 2, p. 2). Candor and accuracy would have required RBC to disclose to the Commission in its fifth extension application that its financing was "on hold" "pending the resolution of [the Miami Tower Litigation]" and that RBC was prepared to go forward with construction *only* if RBC was successful in keeping Press from becoming the fifth market station.

7. The proposed findings submitted by RBC and RBL never come to grips with the stark inconsistency of Mr. Rey's sworn testimony in the Miami Tower Litigation on January 11, 1991, and RBC's affirmative representations in its fifth construction permit extension application. Instead, RBC and RBL try to convert the hearing issue from the "financial misrepresentation" issue designated by the Commission into a reporting issue under Section 1.65 of the Rules. According to RBC and RBL, RBC had no obligation under Section 1.65 to report a change in its financial condition to the Commission because Mr. Rey's testimony in the Miami Tower Litigation reflected only a contingency that never

developed into a reportable change in financial condition under Section 1.65. RBC and RBL argue that the contingency never ripened into a reportable event because Mr. Rey changed his view of the viability of a sixth market station by the time Judge Marcus issued his decision on the preliminary injunction in June 1991. See RBC Findings at ¶ 110 ("RBC was not compelled to report Susan Harrison's or Rey's conclusion that a sixth market station would not have been viable, nor that if RBC found itself in that predicament, that Conant's financing would be lost"); RBL Conclusions at ¶ 13 ("Nothing in the Commission's policies or precedents suggests that an applicant is required to report unrealized changes to the Commission").

8. RBC and RBL focus on the wrong time period, and the wrong applicable legal standard. The financial misrepresentation issue designated by the Commission seeks to determine whether RBC intentionally misrepresented or lacked candor in its fifth extension application -- a question that turns solely on Mr. Rey's state of mind *in January 1991*. The fact, argued by RBC and RBL, that Mr. Rey had changed his views of the viability of a sixth market station sometime later in the spring of 1991 is utterly irrelevant to the designated issue. Significantly, although RBC and RBL attempt to focus on Mr. Rey's more optimistic views in June 1991, they do not dispute that Mr. Rey held the view that the station was not viable as the sixth market station in January 1991 when he filed the fifth extension application.<sup>1</sup> Thus, the record compels the conclusion that Mr. Rey knowingly and

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<sup>1</sup> See RBC Findings at ¶ 110:

The record clearly shows that, by the time the preliminary injunction had been denied, Rey no longer subscribed to that gloomy forecast *which he harbored from some period between November 1990 and mid-1991*. (Emphasis added.)

intentionally misrepresented the facts or, at the minimum, lacked candor in RBC's fifth extension application, regardless of his later change of heart several months later.

9. Further, it is the affirmative misrepresentations of RBC in its fifth extension request -- not its failure voluntarily to come forward under Section 1.65 -- that is the focus of this proceeding. Regardless of whether or not RBC would otherwise have been obligated under Section 1.65 to come forward voluntarily to disclose the new contingency in Mr. Conant's financing in the absence of the filing of its Form 307 application for extension of its construction permit,<sup>2</sup> RBC violated Sections 1.17 and 73.1015 of the Commission rules when it affirmatively misrepresented the true facts or lacked candor in its statements to the Commission in support of its application for extension. When their bogus Section 1.65 argument is stripped away, RBC and RBL offer no defense at all for RBC's affirmative misrepresentations of fact and lack of candor in the fifth extension request.

10. In light of the undisputed evidence regarding Mr. Rey's beliefs at the time he

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RBL Conclusions at ¶10:

*Speaking in the context of the market conditions in Orlando in January 1991*, it was Rey's opinion that if he were to construct WRBW at that time, and if it were to be build then as the sixth rather than the fifth Orlando station, with Press already established as the fifth station, then it was likely that Conant would not finance Rainbow's station. (Emphasis added.).

<sup>2</sup> Although not at issue here, RBC and RBL are incorrect in arguing that the change in RBC's financial qualifications was not sufficient to trigger a filing obligation under Section 1.65 even in the absence of the filing of a Form 307 application. Mr. Conant's financing commitment changed from unconditional commitment to one conditioned on the fact that RBC must be the fifth station in the market. Such a major change in extent of financial backing for RBC is of "decisional significance," and must be timely reported under Section 1.65. See *Texas Communications Limited Partnership*, 6 FCC Rcd 5191, 5192 (1991); *Henry R. Malloy, Jr.*, 10 FCC Rcd 9369, 9372 (ALJ 1995)(failure to report change in financial capability of sole financial backer).

filed the fifth extension application, it is clear that RBC intentionally sought to deceive the Commission regarding material facts relevant to its extension application in violation of Sections 1.17 and 73.1015, and its applications should be denied. See Staff Findings at ¶¶ 144-145.

### Extension/Waiver Issue

11. RBC and RBL contend (RBC Findings at ¶¶ 120-127; RBL Conclusions at ¶¶ 31-49) that the extension/waiver issue should be resolved in RBC's favor. The record establishes, however, that the applicant did not make the required showing at the hearing to justify a grant of its extension applications under either a theory that it complied with Section 73.3534 or a waiver theory. See Staff Findings at 164-183.

12. Under Section 73.3534(b) of the Commission's rules, broadcast station construction permits will be extended only in one of three circumstances: (1) construction is complete and testing is underway looking toward prompt filing of a license application; (2) substantial progress has been made; or (3) no progress has been made for reasons clearly beyond the control of the permittee and the permittee has taken all possible steps to expeditiously resolve the problem and proceed with construction. The Commission adopted these strict criteria for extensions in 1985 and gave explicit notice of its determination to limit construction permit extensions to only those permittees that could make a satisfactory showing under one of the three criteria in Section 73.3534(b). *In the Matter of Amendment of Section 73.3598 and Associated Rules Concerning the Construction of Broadcast Stations*, 102 FCC 2d 1054 (1985) ("*Construction of Broadcast Stations*"). It is also well established that extension applications are to be evaluated based upon events that occurred during the

most recent construction period. *See, e.g., Mansfield Christian School*, 10 FCC Rcd 12589, 12590 (1995).

13. The decision by RBC not to construct its station during "the most recent construction period," when, by its own self-serving calculations, it had a "free and clear," "final" and "valid" construction permit was "at odds with the Commission's policy to encourage permittees to build in a reasonable time or to risk cancellation of their permits." *Wong*, FCC 96-365, ¶ 17, citing *Construction of Broadcast Stations*, 102 FCC 2d 1054. The Miami Tower Litigation -- which was the sole basis for an extension -- was initiated *by RBC*, not by the tower owner,<sup>3</sup> and the purpose of the litigation (as well as RBC's contemporaneous litigation in the D.C. Circuit in *Rainbow Broadcasting Co. v. FCC*, 949 F.2d 405 (D.C. Cir. 1991) challenging the Press channel swap) was to keep Press off of the top slot of the Bithlo tower. The Miami Tower Litigation did not -- by any stretch of the imagination -- preclude RBC from constructing, however.

14. Since RBC twice made the representation to the Commission that the litigation *precluded it from constructing*,<sup>4</sup> and since this was the only basis alleged by RBC for its failure to construct, RBC was required to demonstrate at the hearing that the litigation affected its ability to construct "in order to justify an extension based upon the pending litigation." *Wong*, FCC 96-365, n. 9, citing *Press*, 59 F.3d 1365; and *Rainbow Broadcasting*

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<sup>3</sup> This important fact was not disclosed by RBC in either of the captioned extension applications. *See Staff Findings at* ¶ 72.

<sup>4</sup> *See Press Broadcasting Co., Inc. v. FCC*, 59 F.3d 1365, 1371 (D.C. Cir. 1995) ("*Press*")("the clear import of [RBC's] representation" was "that the tower dispute precluded it from constructing"); and *Staff Findings at* p. 73, n. 17.



Co., 11 FCC Rcd 1167, 1168 (1995). See Section 73.3534(b)(3). RBC did not make such a showing.

15. Whether or not a delay in construction is a matter within the applicant's "control" turns largely on the particular factual pattern presented. The Commission has consistently taken the position that a permittee that postpones construction solely because of economic considerations is considered to have exercised its independent business judgment, a circumstance within the permittee's control and, therefore, not a basis for granting an extension. See *Wong*, FCC 96-365, ¶ 16; *Hymen Lake*, 56 FCC 2d 379, 381 (Rev. Bd. 1975); *Comet Television Corp.*, 46 FCC 2d 1107, 1108 (Rev. Bd. 1974); *Tex-Ark Television Co.*, 38 FCC 2d 650, 653-54 (Rev. Bd. 1972); *Joe L. Smith, Jr.*, 5 RR 2d 582, 589-90 (1965) ("*Smith*"); *The Thames Broadcasting Corp.*, 29 FCC 1110, 1113 (1960) ("*Thames*"). In past cases, the Commission has viewed unfavorably extension requests when delays were occasioned by:

- depressed business conditions, see *Hymen Lake*, 56 FCC 2d at 381;
- the applicant's interest in avoiding competition from other broadcast facilities in the same market, see *Community Service Telecasters, Inc.*, 6 FCC Rcd 6026, 6028 (1991); *UHF Broadcasting Co.*, 53 FCC 2d 660, 665 (Rev. Bd. 1975); and
- the applicant's belief that its proposed broadcast station represented a poor financial risk, see, e.g., *Thames*, 29 FCC at 1113.<sup>5</sup>

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<sup>5</sup> The Commission also has viewed unfavorably extension requests when delays were occasioned by: an applicant's failure to secure a network affiliation, see *Northeast TV Cablevision Corp.*, 21 FCC 2d 442, 448 (1970); *Radio Longview, Inc.*, 19 FCC 2d 966, 969 (1969); *Wilmington Television Corp.*, 20 FCC 1194, 1205-06 (1956); a permittee's decision to restrict its business activities to another co-owned broadcast facility, see *Nelson Broadcasting Co.*, 18 FCC 2d 609, 610 (1969); *Hartford County Broadcasting Corp.*, 38 FCC 2d 847, 849 (Rev. Bd. 1965); an applicant's uncertainty surrounding the planned

16. In this case, Mr. Rey testified at length about the depressed business conditions in the Orlando market in late 1990 - mid 1991 (Tr. 753, 989); RBC's strong desire to avoid competition from Press (Tr. 780-81, 790); and his belief that, during the relevant construction period (August 1990 - August 1991), RBC's station was "worthless" and represented a poor financial risk (Tr. 780, 790). Therefore, it is concluded that the decision by RBC not to construct during the period August 1990 - August 1991 was an exercise of independent business judgment and, as such, the postponement was clearly due to causes under the permittee's control. See *Wong*, FCC 96-365, ¶ 16; *Hagedorn*, 11 FCC Rcd 1695; *Community Telecasters of Cleveland, Inc.*, 58 FCC 2d 1296, 1297, 1300 (Rev. Bd. 1976); *Smith*, 5 RR 2d at 589-90.

17. RBC's and RBL's reliance (RBC Findings at ¶ 124; RBL Conclusions at ¶¶ 33, 35, 39) upon *Channel 16 of Rhode Island, Inc. v. FCC*, 440 F.2d 266 (D.C. Cir. 1971), is misplaced and should be rejected. That case was decided 14 years before the Commission adopted its strict policy concerning construction permit extensions that is now in effect, see p. 7 above, and thus does not provide binding precedent in this case. In any event, the Court of Appeals refused to disturb the Commission's holding that the permittee's failure to

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rerouting of a highway in the vicinity of its proposed transmitter site, *Rollins Broadcasting, Inc.*, 28 FCC 103, 107 (1959) (holding that the decision to delay construction represents "the applicant's business judgment and, however commercially prudent, is quite unrelated to the public interest . . ."); the financial impact of the energy crisis on applicant's parent company, *Rock City Broadcasting, Inc.*, 52 FCC 2d 1246, 1247 (Rev. Bd. 1975); an applicant's reliance upon sources of funding that it knew to be speculative, *Desert Broadcasting Co.*, 34 FCC 1237, 1247 (1963); an applicant's mistaken judgment regarding station's available finances, *City of Jacksonville*, 15 FCC 89, 99 (1950); and a permittee's efforts to move its proposed station to a more financially attractive channel, *Wrather-Alvarez Broadcasting, Inc.*, 25 FCC 1121, 1134 (1958).

reactivate its station in light of proposed competitive cable television operations did not result from circumstances beyond its control. 440 F.2d at 274. Rather, the Court held that in the circumstances of that case there were "other matters sufficient to justify the extension," *id.* at 275, a separate consideration no longer considered relevant by the Commission in construction permit extension cases. See Staff Findings at ¶ 172. RBL is wrong when it argues (*see* RBL Conclusions at ¶ 33) that the uncertainty in FCC policy in the CATV area, cited by the Court in the *Channel 16* case, 440 F.2d at 274-75, somehow excused RBC from going forward with construction after August 30, 1990, because there was a similar uncertainty in this case. There was no uncertainty concerning the finality of the grant of RBC's construction permit as of August 30, 1990. See Tr. 983. As of that date, RBC had a valid construction permit that was no longer subject to Commission or judicial review. *Jt. Ex 1*, p. 2.

18. RBL also contends (RBL Conclusions at ¶¶ 45, 47) that RBC should be granted an extension under the second ("substantial progress") prong of the hardship test of Section 73.3534(b). RBL argues that RBC spent \$60,000 on a transmitter building in the summer of 1991 and approximately \$500,000 on rental payments for the Bithlo tower transmitter site beginning in 1986 and that these expenditures entitle RBC to a grant of its extension applications under Section 73.3534(b)(2). We disagree.

19. The record does not show how much money RBC spent on rental payments between August 1990 and August 1991, the relevant time period in this case, and RBC had the burdens of proceeding and proof. RBL is relying on all the rental payments beginning in 1986, and most of these payments were made outside the relevant construction period

(August 1990 - August 1991) and are thus irrelevant in determining whether to grant the captioned extension applications. *Cf. Mansfield Christian School*, 11 FCC Rcd at 12590; *Community Service Telecasters, Inc.*, 6 FCC Rcd 6026, 6029-30 (1991) (funds spent prosecuting modification application will not be considered "risky" funds when evaluating construction efforts). The transmitter building, moreover, was built as an accommodation for the landlord, and thus provides little, if any, support for RBL's position. *See* Press Ex. 7, pp. 1-3. Under these circumstances, RBC's expenditures during the period August 1990 - August 1991 do not justify a further extension of the construction permit under Section 73.3534(b)(2), which requires substantial and sustained progress toward construction. "Substantial progress" is defined in the rule as a "demonstration that equipment is on order or on hand, site acquired, site cleared *and* construction proceeding toward completion." Section 73.3534(b)(2) (emphasis added). RBC did not do all or most of these things; therefore, it cannot benefit from the rule.<sup>6</sup>

20. Giving new meaning to the term chutzpah, RBL makes the amazing claim (RBL Conclusions at ¶¶ 28-29) that RBC was under no obligation to file extension

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<sup>6</sup> Moreover, RBC did not claim in either of its captioned extension applications that it was entitled to an extension because it had made "substantial progress" toward construction. *See* Section 73.3534(b)(2) of the Commission's rules. Its entire case for an extension rested on the claim that the Miami Tower Litigation precluded it from constructing. *Jt. Exs. 2 & 3. See Carolyn S. Hagedorn*, 11 FCC Rcd 1695, 1696 ¶ 12 (1996) ("*Hagedorn*") ("an applicant must either take the initiative to present its case fully and completely at the outset, or bear fully the risk that its showing will be found inadequate"). *See also Deltaville Communications*, FCC 96-343, released September 12, 1996. It was not until RBC filed a supplement to its sixth extension application on November 27, 1991 that RBC claimed that it had made some progress toward construction by building a transmitter building at its transmitter site and "engag[ing] in final equipment selection." *Jt. Ex. 5*, p. 2. RBC also repeated its promise to "be operational by December 1992," *id.*, a promise it did not keep.

applications, let alone justify extensions of time, after the Supreme Court denied rehearing in *Metro Broadcasting* in August 1990. RBL argues that RBC was entitled to an unfettered two years to construct after judicial review in the licensing proceeding was complete and thus was not required to make the showings ordinarily required of other permittees by Section 73.3534. RBL Conclusions at ¶¶ 37-38, 43.

21. This argument was considered and firmly rejected by the Court of Appeals in *Press*, 59 F.3d at 1371-72, and thus must be rejected here because neither the Presiding Judge nor the Commission has the authority to overrule the Court of Appeals. *See* 47 U.S.C. § 402(h). In the words of the Court, RBC "was unquestionably required to apply and qualify for an extension." 59 F.3d at 1372. To accept RBL's incredible argument at this juncture would "arbitrarily relieve[] [RBC] of its obligations under" Section 73.3534. *Id.* The Court's decision is the law of the case and RBC and RBL are bound by it.<sup>7</sup>

#### **Ex Parte Issue**

22. With respect to the *ex parte* issue, the Staff takes a middle course between the proposed findings of Press and RBC. The Staff essentially agrees with the findings of fact proposed by Press, but agrees with RBC's conclusions that the circumstances here (even on the facts proposed by Press) do not justify disqualifying RBC.

23. The Staff strongly disagrees with RBC on the credibility of Mr. Gordon. *See* Staff Findings at 119-121. RBC contends that Mr. Gordon's recollection that he cut Ms. Polivy off when she attempted to raise the merits of RBC's pending applications should not

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<sup>7</sup> In any event, RBC did not construct within two years of the Supreme Court's order denying rehearing in *Metro Broadcasting*, and when RBC finally got around to constructing in 1993, it took only 7 ½ months to get the station on the air.

be credited because (1) he could not recall the details of the merits she allegedly attempted to discuss; (2) failed to make any notes of the conversations; (3) made no written report of the *ex parte* contacts as required by the rules; and (4) was not sure whether the filing of Press' informal opposition or petition for reconsideration caused the proceeding to become restricted under the rules. See RBC Findings a ¶ 87. None of RBC's arguments warrants crediting Ms. Polivy over Mr. Gordon on the matters in which they disagree.

24. Mr. Gordon's testimony was only that Mr. Polivy *attempted* to discuss the merits and he immediately cut her off. See Staff Findings ¶ 28. In other words, Ms. Polivy was not permitted to actually make an *ex parte* presentation, but was stopped immediately when she tried to raise the merits. In these circumstances, it is not surprising that Mr. Gordon remembers cutting her off, but does not remember specifically what she was trying to say on the merits. The fact that Ms. Polivy was cut off immediately also explains why Mr. Gordon did not make any record of the *ex parte* contact or file a report of an *ex parte* presentation -- none actually occurred. The fact that Mr. Gordon may have been confused about what triggered the *ex parte* prohibition is simply irrelevant to whether he correctly recalls informing Ms. Polivy that the matter was restricted.

25. Moreover, RBC offers no reason at all why Ms. Polivy -- an interested participant -- should be credited over Mr. Gordon. Indeed, RBC does not even endorse Ms. Polivy's own self-serving claim that Mr. Gordon's testimony was somehow motivated by "animus." Nor does RBC address the Presiding Judge's observation that if Ms. Polivy in fact did not believe that the proceedings were restricted as to RBC, she had every reason to attempt to raised the merits in her discussions with Mr. Gordon, and an actual reason to do

so after receiving the March 18, 1991 letter that questioned whether granting the applications would be in the public interest. *See* Staff Findings at ¶ 120-21. In short, there is simply no reason to credit Ms. Polivy over Mr. Gordon.

26. The Staff also disagrees with RBC's claim that the record does not support that Ms. Bush did not do "anything other than to secure a status update." RBC Findings at ¶ 89 n.9. On the contrary, based on the testimony of Mr. Stewart (which Ms. Bush said she could not dispute), the record shows that Ms. Bush asked whether the rejection of RBC's applications was consistent with the Commission's minority ownership policies -- a presentation on the merits. *See* Staff Findings at ¶ 123-127.

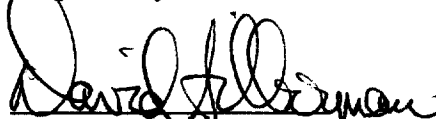
27. Although Press offers essentially the same facts, it reaches a different conclusion on the *ex parte* issue based largely on the judgment that Ms. Polivy knowingly went forward with the *ex parte* contacts in the face of the explicit position of Mr. Gordon that the proceeding was restricted, and Mr. Rey's attendance at the July 1, 1993 meeting in Mr. Stewart's office. *See* Press Findings at ¶ 186-88. Although Press' reasoning is sound in most respects, the Staff does not agree that the circumstances warrant disqualification of RBC. The Staff based its conclusion on the evidence indicating that (1) Ms. Polivy acted out of a sincere, if mistaken, legal opinion which she apparently asserted repeatedly in response to Mr. Gordon's position; (2) there was no attempt to conceal the *ex parte* contacts; (3) there was no evidence Ms. Polivy conveyed to Mr. Rey any suggestion that the proceeding was restricted, and did not forward to him the Daniels letter or a report on Mr. Gordon's views; (4) none of the RBC principals were personally involved in fostering *ex parte* contacts other than attending a meeting at which Ms. Polivy was the main actor; and (5) the two *ex parte*

contacts established in the record were isolated incidents occurring in a contested proceeding that spanned many years. *See* Staff Findings at ¶¶ 132-138. Particularly in view of the sparse precedent for disqualification of an applicant for the intentional *ex parte* contacts of its counsel (*see* Staff Findings at ¶ 139-40; Press Findings at ¶ 190), and the evidence supporting Ms. Polivy's claim to a sincerely held, if mistaken, legal opinion, the Staff disagrees with Press that this particular case rises to the level at which RBC should be disqualified for the *ex parte* contacts of its counsel.

### CONCLUSION

In conclusion, the Separate Trial Staff recommends that the two character qualifications issues (issues 2 and 3), the extension/waiver issue (issue 4), and the ultimate issue (issue 5) be resolved against RBC. The *ex parte* issue (issue 1) should be resolved in RBC's favor. The staff further recommends that the two extension applications be denied, that the assignment application be dismissed as moot, and the construction permit be cancelled.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

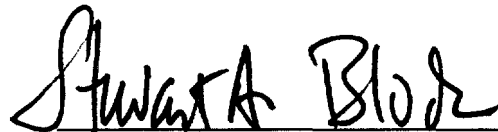
I hereby certify that copies of the foregoing Separate Trial Staff's Consolidated Reply to Proposed Findings of Fact and Conclusions of Law were delivered by hand this 24th day of October 1996, to the following:

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